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In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

v.

ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

CHARLES J. COOPER
MICHAEL A. CARVIN
DAVID THOMPSON
COOPER & CARVIN
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8950

LLOYD N. CUTLER
Counsel of Record
LOUIS R. COHEN
JONATHAN J. FRANKEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

MICHAEL DAVIDSON
3753 McKinley Street, N.W.
Washington, D.C. 20015
(202) 362-4885

ALAN B. MORRISON
COLETTE G. MATZZIE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

May 9, 1997

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QUESTIONS PRESENTED

Appellees agree with the statement of the Questions Presented made by appellants in their Jurisdictional Statement.

PARTIES TO THE PROCEEDINGS

Appellees agree with the statement of the Parties to the Proceedings made by appellants in their Jurisdictional Statement.

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On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEES

OPINION BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellees agree with the statements of the Opinion Below, Jurisdiction, and Constitutional and Statutory Provisions Involved made by appellants in their Jurisdictional Statement.

STATEMENT

The Line Item Veto Act of 1996, Pub. Law No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. §§ 681 note, 691 *et seq.*) (the "Act"), fundamentally changes the process for making federal appropriation, direct spending, and tax laws. Under the Act, when Members of Congress vote to pass a bill that contains certain kinds of "items," they are not voting for that bill only, but rather voting to give the President a menu of provisions from which he may unilaterally select the final combination. The district court held correctly that (a) Members have constitutional standing to challenge this change in the legal effect of votes they are about to cast, and (b) the Constitution does not permit Congress to give the President this power to make federal law, either by vetoing items as he signs a bill or by unilaterally repealing items as soon as a moment later.

The Act was signed by President Clinton on April 9, 1996, and became effective on January 1, 1997.[1] The Act itself provides that "Any Member of Congress" may bring an action to declare provisions of the Act unconstitutional. Plaintiffs (appellees in this Court) are three Senators, one former Senator, and two Members of the House of Representatives. Defendants (appellants) are Franklin D. Raines, the Director of the Office of Management and Budget, and Robert E. Rubin, the Secretary of the Treasury, each of whom has official responsibility for executing Presidential "cancellations" under the Act.

As its title indicates, the Act confers on the President, for eight years, the power to item veto provisions of future appropriation, direct spending, and tax bills. As has been

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[1] The Joint Appendix ("J.A.") includes a Legislative History Summary ("L.S.") filed below by plaintiffs and an Index of Legislative History Materials filed jointly by the parties.

widely noted, 43 state governors have somewhat similar powers, but in every case their state constitutions explicitly so provide.[2] Under the Act, the President may, immediately or up to five days after signing a bill, "cancel" any dollar amount of discretionary budget authority, item of new direct spending, or "limited tax benefit" by sending a cancellation message to Congress. Cancellation is permanent and irreversible. Congress may restore an item by passing a "disapproval bill," but this is a new law that must be passed in the usual manner including, if necessary, an override of the President's veto by a two-thirds vote of each House.

Proponents of the Act recognized that it brought about a major shift of power from Congress to the President. *See* 141 Cong. Rec. S.2960 (daily ed. Mar. 27, 1996) (statement of Sen. Gramm) ("no doubt about it—and the distinguished Senator from West Virginia [appellee Senator Byrd] is right—it changes the balance of power between the Congress and the President in one fundamental way: It gives the President enhanced power to say 'no' to spending."); *id.* at S.2978 (statement of Sen. Kyl) ("Make no mistake about it, this bill will shift a great deal of new power to the President."). The question presented, of course, is not whether this shift of power is desirable, but whether it is constitutional. *See U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1871 (1995).

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[2] *See Item Veto: State Experience and Its Application to the Federal Situation*, House Comm. on Rules, 99th Cong., at Appendix C-1 (Dec. 1986) (committee print); *see also* Richard Briffault, *The Item Veto In State Courts*, 66 Temple L. Rev. 1171, 1175-77 (1993).

A. History of The Line Item Veto Act of 1996

As the district court recognized, ever since President Washington recognized that the Constitution permitted him only to sign or veto a bill "in toto,"[3] Presidents have sought the authority to veto selected provisions of bills. Jurisdictional Statement ("J.S.") at 5a (citing 12 Op. Off. Legal Counsel 128, 157-65 (1988)). Some Presidents have also sought to cut programs and expenditures by "impounding" (refusing to spend) appropriated funds. *See Train v. City of New York*, 420 U.S. 35, 44-46 (1975); *City of New Haven v. United States*, 634 F. Supp. 1449, 1454-55 (D.D.C. 1986) (summarizing cases), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987). Congress responded by regulating impoundments, in a constitutional manner, in the Impoundment Control Act of 1974, Pub. L. No. 93-344, Tit. 10, 88 Stat. 332 (codified as amended at 2 U.S.C. § 681 *et seq.*) ("ICA"). This case concerns an unconstitutional "enhancement" to the ICA, known as "enhanced rescission."

The ICA permits the President to defer spending certain authorized amounts for a period up to the end of the current fiscal year, 2 U.S.C. §§ 682(1), 684(a), but it does not permit the President to rescind such authority permanently.[4] Instead,

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[3] *See* 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940).

[4] The ICA of 1974 permitted the President to defer budget authority temporarily upon the transmission of a special message, but required that the money nevertheless be expended by the end of the fiscal year. Pub. L. 93-344, tit. 10, § 1013, 88 Stat. 334 (1974) (as then codified at 2 U.S.C. § 684(a)). If Congress disagreed with the President's deferral decision, one house could pass a legislative veto making the appropriation available for immediate obligation. 2 U.S.C. § 684(b) (now repealed). After this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), the ICA was amended to delete the legislative veto provision

(continued...)

the President may "propose[]" to Congress "that such budget authority should be rescinded for fiscal policy or other reasons," but such a rescission takes effect only if Congress acts on the proposal by passing a law. *Id.* § 683. The Line Item Veto Act "enhances" this arrangement by allowing the President to rescind spending provisions himself, without the passage of a new law.

The 104th Congress also considered a more modest, and constitutional, amendment to the ICA to deal with the fact that the ICA did not require Congress even to consider a presidential rescission proposal. Bills such as S.14, referred to in Congress as "expedited rescission" bills, would have required that any presidential rescission proposal be put to a prompt vote. *See* S. Rep. No. 104-10 at 1 (1995). In the words of its sponsors, S. 14 would have "guarantee[d] the President a vote on his rescission proposals while maintaining the delicate balance of power between the two branches on spending authority." *Id.* [5]

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[4] (...continued)
and to impose substantial limits on the use of deferral authority. *See* Pub. L. No. 100-119, tit. 2, § 206(a), 101 Stat. 785 (1987) (codified at 2 U.S.C. § 684(b)).

[5] Congress also considered constitutional amendments to give the President the item veto power, but they were never voted on. S.J. Res. 2, 14, 15, and 16, 104th Cong. (1995); H.J. Res. 4, 6, and 17, 104th Cong. (1995); *see also The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong. (1995). A statutory alternative, offered on the Senate Floor, was to give the President the equivalent of item veto power through "separate enrollment": after a spending or tax bill had been agreed upon by both Houses, the enrollment clerks would divide it into separate items and prepare a separately enrolled bill for each item; Congress would then pass the bills en masse, but the President could then sign or reject each bill separately. J.A. at 77-79 (L.S. at 12-14). Both
(continued...)

Congress decided to go further and give the President what it labeled—accurately—the Line Item Veto power: the power to strike some provisions of a bill in conjunction with signing the remainder into law. The mechanism chosen was to give the President authority not merely to "propose" rescissions for congressional consideration, as under the ICA, but to "cancel" authorization and spending items unilaterally. *See* S. Rep. No. 104-9, at 1 (1995) (bill would "expand the President's power to reduce discretionary spending by giving him the authority to cancel budget authority without any other action required by Congress"). Members were quite clear that their intention was to invert the legislative process: "Presidential proposals will now become law unless Congress takes action to stop them." H.R. Rep. No. 104-11, pt. 2, at 9 (1995).

All concerned agreed that the Act's effects on the legislative process would be dramatic. The Administration's spokesperson described the enhanced rescission bill that became the Act as a "two-thirds bill" because the President's cancellation order "is final and what happens in Congress is that Congress then must vote a new bill to actually proceed with that funding, which the President can then veto." *The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong. at 34 (1995) ("1995 Judiciary Comm. Hrgs.") (statement of Assistant Attorney General Dellinger). Senator McCain echoed this point in floor debate: "[The

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[5] (...continued)
constitutional and administrative objections were raised to this cumbersome process, and although it passed the Senate, it did not survive the Joint Conference. *See* J.A. at 82-83 (L.S. at 18); 141 Cong. Rec. S4217 (daily ed. Mar. 21, 1995) (statement of Sen. McCain); *id.* at S4224-35 (statement of Sen Byrd); *id.* at S4244 (statement of Sen. Exon).

objective of the Act is to require] a two-thirds vote on the part of both Bodies in order to override the President's veto—that is what 43 Governors have and that is what the constitutional meaning of veto is . . . ." 141 Cong. Rec. S4158 (daily ed. Mar. 20, 1995) (statement of Sen. McCain); *see also id.* S4192 (daily ed. Mar. 20, 1995), S4220-22 (daily ed. Mar. 21, 1995), S4479 (daily ed. Mar. 23, 1995) (statements of Sens. Coats and Craig).

Members also recognized that the existence of the Act would affect Member behavior and the legislative process well before any exercise of the item veto. *See, e.g.*, 141 Cong. Rec. S4140 (daily ed. Mar. 17, 1995) (statement of Sen. Coats) ("[I]t will change the spending habits of Congress . . . [w]e will never know the amount of money we save for items that will not be put in these new bills for fear of exposure. Because the President has the line-item veto, it will change the way we put the bills together in the first place."); *id.* S4220 (daily ed. Mar. 21, 1995) (the line item veto power "will fundamentally change the way we think and behave"). Members also recognized that the President's new power could affect their votes on nonspending legislation and other matters (such as appointments) coming before Congress. *See, e.g.*, 141 Cong. Rec. H2976, H2978 (daily ed. Mar. 28, 1996) (statements of Reps. Beilenson and Skaggs); *id.* at S2937, S2941, S2955, S2969 (daily ed. Mar. 27, 1996) (statements of Sens. Byrd, Hatfield and Bumpers).

B. The Act

The full title of the Act is "An Act to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." H.R. Conf. Rep. No. 104-491 at 14 (1996). It provides that the President may "cancel in whole" any (1) "dollar amount of discretionary

budget authority," (2) "item of new direct spending," or (3) "limited tax benefit" by sending Congress a "special message" immediately (or within five days) after signing a bill containing the item. 2 U.S.C. § 691(a). Cancellation takes effect when Congress receives the special message. 2 U.S.C. § 691b(a).

The President must determine that the cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." *Id.* § 691(a)(A). No more specific or substantive determination is required. Only one special message is to be sent with respect to each bill. A special message must state all amounts, items, and benefits to be canceled, recite the three required determinations, set forth the President's reasons for the cancellation, and describe the fiscal and programmatic effects of the cancellation. *Id.* § 691a(b).

The Act defines "dollar amounts of discretionary budget authority" to include any whole amount of appropriation either set forth in the text of the law or found in (or determinable from) the tables, charts, or explanatory text of statements or committee reports accompanying a bill. 2 U.S.C. § 691e(7). Items of new "direct spending" are "(A) budget authority provided by law (other than an appropriations law); (B) entitlement authority; and (C) the food stamp program," 2 U.S.C. § 691(e)(5); "items" thus include "entitlement" payments to individuals or state and local governments. H.R. Conf. Rep. No. 104-491, at 36 (1996). "Limited tax benefits," covered by the Act at the insistence of many Members, *see* J.A. at 82 (L.S. at 17), are defined to include any revenue-losing provision that gives tax relief to 100 or fewer persons in any fiscal year or grants "temporary or permanent transitional relief" from a change in the Internal

Revenue Code to 10 or fewer persons. 2 U.S.C. § 691e(9).[6]

The Act defines "cancel" as "to rescind" (with respect to any dollar amount of discretionary budget authority) and to "prevent . . . from having legal force or effect" (with respect to items of new direct spending or limited tax benefits). 2 U.S.C. § 691e(4). The purpose of the term and its definition was to make it clear that the President's action would be permanent and irreversible: "The term 'cancel' was specifically chosen, and is carefully defined. . . . The conferees intend that the President may use the cancellation authority to surgically *terminate* federal budget obligations." H.R. Conf. Rep. No. 104-491, at 20 (1996) (emphasis added). For taxes, cancellation would mandate "collect[ion of] tax that would otherwise not be collected or den[ial of] the credit that would otherwise be provided." *Id.* at 29. Congress was aware that, by choosing the word "rescind," it was giving the President alone the power to do exactly what the ICA had previously required a new law to accomplish. *See id.*

The history of the term "cancel" is also important. An earlier version of what became the Act used the terms "veto" and "repeal." H.R. 2, 104th Cong. § 2 (1995). Assistant Attorney General Dellinger warned the Senate that constitutional questions would be raised about a statute purporting "to authorize the President to 'veto' targeted tax benefits after they become law, thus resulting in their 'repeal.'" H.R. Conf. Rep. No. 104-491, at 49 (1996). He said that "use of the terms 'veto' and 'repeal' is constitutionally problematic" because the Presentment Clause, Art. I, Section 7, Clause 2, provides that the President only can exercise his 'veto' power before a provision becomes law"

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[6] Amendments supported by the Judicial Conference of the United States to create exceptions for certain spending relating to the Judiciary were defeated in both Houses. J.A. at 67-70, 82 n. 4 (L.S. at 1-2, 4-5, 17 n.4).

and "the word 'repeal' . . . suggests that the President is being given authorization to change existing law on his own [which] arguably would violate the plain textual provisions of Article I, § 7 of the Constitution, governing the manner in which federal laws are to be made and altered." *Id.* His proposal for avoiding these "constitutional shoals" was to "eliminate[] the word 'veto' from the targeted tax benefit provision, and confer[] on the President the power to *suspend* (rather than 'repeal') such benefits." *Id.* (emphasis in original) The Administration made the same point in a letter to the Joint Conferees from Alice Rivlin, appellant Raines's predecessor. J.A. at 91-92 (attachment to L.S.). These warnings, however, produced a merely cosmetic change. The word ultimately chosen was "cancel." The purpose and effect of the statute remained unchanged: to give the President the functional equivalent of the line item veto, through the mechanism of unilateral presidential termination of enacted provisions of law.

In order to restore a canceled item, Congress must pass a "disapproval bill." 2 U.S.C. §§ 691d, 691e(6). The Act provides for expedited consideration of disapproval bills, *id.* § 691d, which are not subject to the President's cancellation authority under the Act. *Id.* § 691(c). But a disapproval bill is a new law, which must be passed by both Houses and presented to the President in the manner prescribed by Article I, Section 7, Clause 2 of the Constitution. The cancellation "is nullified only if a disapproval bill is enacted into law [in which case the] effective date for any cancellation . . . is the original date provided in the law to which the cancellation applied." H.R. Conf. Rep. No. 104-491, at 22 (1996).

Finally, the Act provides that "Any Member of Congress or any individual adversely affected . . . may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on

the ground that any provision of [the Act] violates the Constitution." 2 U.S.C. § 692(a). The Act provides for direct appeal to this Court and directs both courts "to expedite to the greatest possible extent the disposition of any matter brought under [this provision]." *Id.* § 692(c). The Act contains these provisions because Members of Congress recognized that the Act would have an immediate effect on Members in exercising their constitutional roles as lawmakers, that the Act's constitutionality was in doubt, that this "constitutional cloud" would create uncertainty about the validity of vetoed items and other provisions of future statutes,[7] and that the constitutional questions should therefore be decided as soon as possible and in advance of a presidential exercise of cancellation authority.[8]

C. Proceedings Below

Appellees filed their complaint on January 2, 1997, the first business day after the Act became effective, seeking a declaratory judgment. Appellants moved to dismiss for lack of jurisdiction, and appellees moved for summary judgment on

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[7] *See, e.g.*, 141 Cong. Rec. S4244 (daily ed. Mar. 21, 1995) (statement of Sen. Exon) ("[W]e do not want a constitutional cloud hanging over what I think we will eventually pass. . . . The pending amendment [the judicial review provision] simply allows a speedy resolution of this constitutional issue. It does not allow a legal challenge to hang over all the bills for years upon years."); 141 Cong. Rec. H1138 (daily ed. Feb. 2, 1995) (statement of Rep. Deal) (offering expedited review provision because "until that constitutionality [of the Act] is clarified, it will be under a cloud"); 141 Cong. Rec. S4244-45 (daily ed. Mar. 21, 1995) (colloquy of Sens. Simon and McCain).

[8] In conference, a severability provision that had been added to the judicial review section in the Senate, 141 Cong. Rec. S4244 (daily ed. Mar. 21, 1995), was deleted without explanation. H.R. Conf. Rep. No. 104-491, at 41 (1996).

the merits. In support of their motion, appellees each submitted a declaration describing injuries the Act causes him individually as a Member of Congress.

As described in these declarations, even in advance of any vote in Congress, the Act affects appellees' powers in negotiating and drafting legislation. Former Senator Hatfield stated, based on his 25 years of negotiating and shepherding appropriations bills to passage, that the Act would have "an immediate and pervasive impact on the formulation of legislation." J.A. 39-40 (Hatfield Decl. ¶ 4). Appellees explained that, prior to the Act, Members could reach compromises with each other on spending and tax bills, accepting undesired inclusions (or omissions) in return for desired provisions, because every Member had assurance that a bill could take effect only in the agreed form, and that there would be a new opportunity to vote on any changes. J.A. 33-34, 43-45, 63 (Byrd Decl ¶ 18; Levin Decl. ¶ 6; Waxman Decl. ¶ 7). Under the Act, Members cannot reach such compromises because the President has the power to undo them. J.A. 35-36, 39-40, 42-43, 59, 63 (Byrd Decl. ¶¶ 20-21; Hatfield Decl. ¶ 4; Levin Decl. ¶¶ 4, 6; Skaggs Decl. ¶ 6; Waxman Decl. ¶ 7).

Appellees also stated that the Act changes, in a manner they allege is unconstitutional, the legal effect of votes they are certain to cast before the start of fiscal year 1998 on October 1, 1997. They explained that, since the Act gives the President the power to alter bills in connection with signing them, a Member's vote for such a bill has different consequences than it had before. Under the Act, Members will vote on bills, parts of which may be eliminated by unilateral presidential action subsequent to their votes. J.A. 33-34, 43-46 (Byrd Decl. ¶ 18; Levin Decl. ¶¶ 6-7). Using this item veto power, the President can reshape legislation to produce results that would never have passed Congress. J.A.

43-46, 62 (Levin Decl. ¶¶ 6-7; Waxman Decl. ¶ 3). Until now, when a Member voted for an appropriation or tax bill containing more than one item (as virtually all such bills do), he knew that his vote could be counted only for that bill, with exactly those items and only those items, and that any variation would require another vote. Under the Act, the Member's same vote on the same bill becomes a vote to give the President a menu of items that he may choose from, without going back to Congress for another vote. By forcing Members, whenever they vote for an appropriation or tax bill, to give the President a range of alternative bills, the Act injures appellees whenever a bill comes up for a vote, even if, in a particular instance, the President later decides to approve everything in the bill. J.A. 33-34, 44-45 (Byrd Decl. ¶¶ 18-19; Levin Decl. ¶ 6B).

Appellees also explained that the authority granted the President under the Act alters the ground rules and hence the balance of power between the Executive Branch and Members of Congress, and among Members of Congress, over both spending and non-spending legislation, as well as over other matters in Congress. J.A. 35-36, 40, 54, 63 (Byrd Decl. ¶ 20; Hatfield Decl. ¶ 5; Moynihan Decl. ¶ 17; Waxman Decl. ¶ 8). Now, when considering a vote on any matter in which the President has an interest (*e.g.*, other legislation, a treaty, or a presidential appointment) or thinking of criticizing the President, each appellee must weigh the President's power to line item veto an appropriation or tax item of interest to him. J.A. 43-44, 58 (Levin Decl. ¶ 6A; Skaggs Decl. ¶ 3).

Although the President has not yet been presented with any bills containing cancelable items, budget negotiations and appropriation committee hearings for fiscal year 1998 have been under way for some time. As of May 1997, Congress has begun to act on supplemental appropriations bills. H.R. 1469, 105th Cong. (1997); S. 672, 105th Cong. (1997).

Votes on full appropriations bills for fiscal 1998 are certain to occur within the next several months as mandated by section 300 of the Congressional Budget Act of 1974. J.A. 32-33 (Byrd Decl. ¶ 16). Thus, by early summer, votes on full appropriations bills subject to the Act will be cast first at the committee level in each House, and then on the floors of the two chambers. During September, votes on final passage of appropriations bills will occur in both chambers in order to complete action before the beginning of the fiscal year. J.A. 32-33 (Byrd Decl. ¶ 16).

Appellants cross-moved for summary judgment. They submitted no evidence in response to appellees' declarations and agreed that there were no factual disputes requiring a trial. Oral argument was held on March 21, 1997, and on April 10, 1997, the district court granted summary judgment for appellees.

First, the court held that appellees had asserted sufficient injury to give them Article III standing. Specifically, the court found that the Act "dilutes [Members'] Article I voting power" because, under the Act, "the Member's vote operates only to present the President with a 'menu' of items from which he can select." J.S. at 11a. "Thus, plaintiffs' votes mean something different from what they meant before, for good or ill, and plaintiffs who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it." *Id.* at 11a-12a. The court also found that the Act harms appellees by altering the dynamics of lawmaking, because compromises between individual lawmakers can no longer be binding because they must take into account the President's cancellation power. *Id.*

The district court also rejected appellants' contention that the case would not be constitutionally "ripe" until an item has been vetoed. Noting that this case "will not be clarified" by

the President's exercise of an item veto, *id.* at 14a, the court found that appellees alleged current and imminent injuries, because the "threat of the veto" hangs over them like the "sword over Damocles," creating a "'here-and-now'" subservience to the President before and after Members vote on appropriations bills. *Id.* at 13a (quoting *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Airport Noise, Inc.*, 501 U.S. 252, 265 n.13 (1991)). For these reasons, and because votes on appropriations bills are inevitable and "certainly impending" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)), the district court concluded that it was appropriate for it to accede to Congress's directive to address the constitutional cloud over the Act as swiftly as possible. J.S. at 14a.

On the merits, the district court framed the question as whether the Act was merely an enlargement of historical impoundment powers, and hence a valid delegation of discretion in executing spending and tax bills, as appellants had argued, or "rather a radical transfer of the legislative power to repeal statutory law," as appellees asserted. *Id.* at 17a. While recognizing that Congress may delegate impoundment proposal authority to the President, the district court held that "it may not confer the power permanently to repeal an appropriation or tax benefit that has become the law of the United States" because that power must be exercised by Congress and may not be delegated. *Id.*

The Presentment Clause, the district court wrote, enforces "bicameralism" and circumscribes the President's ability to act unilaterally. *Id.* at 17a (citing *Field v. Clark*, 143 U.S. 649, 692-93 (1892)). The President's contribution to the lawmaking process is "merely a qualified check on the will of the legislature." J.S. at 17a. Once the President signs a bill into law, his only constitutional responsibility is to take care that the law is faithfully executed. By permitting the President

to cancel portions of a statute, Congress has attempted to give the President the unilateral power to effect a partial repeal, "precisely what the Presentment Clause was designed to prevent." *Id.* at 21a-22a.

The district court rejected appellants' argument that the Act represented merely an extension of the discretionary power not to spend. It acknowledged that the courts have upheld the delegation of "vast authority to the Executive Branch" to make and change rules so long as those rules further the will of Congress. *Id.* at 23a. But, the court wrote, appellants are mistaken in assuming that they "must only surmount the delegation doctrine," because the Act does not confer a delegable power but, instead, cedes "basic legislative authority." *Id.* at 24a. "Cancellation under the Act is not the same as impoundment" but instead is "equivalent to repeal." *Id.* at 25a. The court recognized that cancellation is permanent, closely tied to the President's "approval" of the bill, and not an exercise of executive authority based on changed circumstances. *Id.* The court further observed that never before had Congress attempted to give away the power to shape the contents of a statute, and "canceling . . . cannot be considered [the law's] faithful execution." *Id.* at 26a.

Finally, the district court noted the breadth of appellants' theory of delegation, under which "there is virtually no limit to the express Article I powers Congress may delegate," even the power to reconfigure an environmental or civil rights law. *Id.* Because Congress may not hand off to the President authority over "fundamental legislative choices," the Act violates the constitutionally prescribed procedures for lawmaking. *Id.* at 27a-28a.

SUMMARY OF ARGUMENT

This case presents two questions. First: Could Congress constitutionally authorize its own Members in the Line Item Veto Act to challenge the constitutionality of that Act? The district court held correctly that Congress could do so because the Act inflicts concrete present and imminent injuries on individual Members in the exercise of their lawmaking powers under Article I of the Constitution.

Second: May the President constitutionally be given the power to alter future federal statutes by striking provisions of appropriations, direct spending, and tax bills in conjunction with signing them into law? The district court held correctly that the President cannot be given this item veto power either directly or, as under the Act, slightly disguised as a unilateral right to cancel, and thus repeal, statutory provisions the instant after signing them.

I. The purpose of the standing requirement of Article III is to confine the federal courts to their constitutional duty of resolving cases and controversies and to prevent an inappropriate intrusion into matters properly left, in a democratic society, to the elected branches of government. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992). The standing requirement is, of course, equally applicable to plaintiffs who are Members of Congress, and appellees recognize that some cases brought by Members may cause concern about improper judicial intrusion. But all Article III concerns are satisfied where (a) the Member plaintiffs allege concrete, individual, judicially redressable injuries; (b) Congress has, by law, authorized Members to bring this suit at this time; and (c) the claims are themselves otherwise appropriate for judicial resolution.

Appellees have alleged the kind of injury required by this Court's decisions. The core power and responsibility of their

job is to vote on the final passage of bills. The Act injures them because it changes the effect of their votes on important categories of bills. It denies them the right to vote for a bill only in the exact form in which it will have operative effect. Instead, it unconstitutionally converts their votes into votes for a range of options from which the President may pick and choose. This injury is plainly imminent, since negotiations and deliberations about the contents of spending and tax bills are occurring now, and the law requires actual votes on such bills very soon. Nor is there any doubt that the injury is redressable by a declaration that the Act is unconstitutional. If appellees were members of any other occupation, and similarly alleged that a statute unconstitutionally altered the legal consequences of a core occupational activity, they would clearly have standing.

Contrary to arguments made by appellants below and in their Jurisdictional Statement (J.S. at 18), appellees are not arguing that Members have standing whenever they have a complaint about "the operation or outcome of the legislative process," and the Court need not endorse Member standing in all of the cases in which lower federal courts have found it. Appellees have Article III standing here because the Act unconstitutionally interferes with their individual constitutional prerogatives and duties as lawmakers by changing the meaning of the votes they cast.

Any concerns about the appropriateness of judicial resolution of the constitutional question presented are eliminated by two considerations. First, the Act itself authorizes Members to bring this case and directs the courts to decide the issue as expeditiously as possible. Second, as appellants appear to concede, if the present claims were brought at some much later date by a non-Member plaintiff (*e.g.*, an individual or firm with a specific economic interest in an unconstitutionally vetoed item), the issue here presented

is one that the Court would decide. The separation of powers and the robustness of the political process will be bolstered, not threatened, by a decision of this Court resolving the constitutional issue presented.

II. Article I vests the responsibility for enacting, amending, and repealing federal statutes in the two Houses of Congress, both of which must pass every bill in exactly the same final form before it may become law. Article I gives the President only a qualified check on the process: the power to veto a bill *in toto*, subject to congressional override. It denies him the power to modify the law unilaterally, either by item vetoing provisions of a bill as he signs it, so that only the portions he selects become law, or by striking and thus repealing provisions after the bill has become law. These limitations, recognized since the founding of the Republic, have structural importance in our constitutional scheme: they preserve the constitutional role of each House of Congress and its Members in determining what federal law will be.

The Act is an unconstitutional attempt to do indirectly what the text of Article I forbids. The Act's purpose, indicated by its title and repeatedly stated throughout its legislative history, is to give the President the line item veto power that the Constitution denies him, and that is exactly its effect. It authorizes the President to cancel items the instant after signing a bill, conceivably in the same breath (and in no event more than five days later). There is no practical difference between giving the President power to strike items at the same time he signs a bill and giving him power to strike them immediately afterwards.

The mechanism chosen to evade the *in toto* requirement is unconstitutional. To "cancel" an item is to repeal it, and the Constitution requires bicameral passage and presentment to the President for repeals of laws, no less than for enactments. The Act defines "cancel" to mean "rescind" and "prevent . . .

from having legal force or effect." 2 U.S.C. 691e(4). The effect of a cancellation under the Act is to eliminate a provision permanently and irretrievably (subject to passage of a new statute), rather than to take care that it is faithfully executed.

The Act does not, as appellants have argued, merely delegate in a new manner a discretionary power to decline to spend. The Act contains provisions dealing with entitlements and tax benefits to which this explanation is wholly inapplicable. Moreover, the Act gives the President a virtually unfettered power to alter statutes themselves at their enactment, not the continuing discretion to carry out the law as circumstances dictate. In conjunction with signing a statute, the President may permanently strike items as he sees fit, even though they were passed by Congress. But the power disappears after five days, and the President cannot thereafter make or adjust any spending decisions based on post-enactment findings, experience, or changes in circumstances. The Act does not resemble any prior statute examined by this Court granting such discretionary power over spending (or any other activity) because its purpose is not to give the President any form of executive discretion, but rather to give him the line item veto that the Constitution denies him.

ARGUMENT

I. THE APPELLEES, AS MEMBERS OF CONGRESS, HAVE CONSTITUTIONAL STANDING TO BRING THIS CASE AT THIS TIME

The Act provides that "[a]ny Member of Congress . . . may bring an action . . . for declaratory judgment and injunctive relief on the ground that any provision of [the Act] violates the Constitution." 2 U.S.C. § 692(a). As the district court recognized, J.S. at 1a, this review provision was intended to permit challenges before a veto is exercised, and it eliminates all prudential barriers to appellees' standing.[9] The question presented is whether Congress may constitutionally confer standing on its Members to challenge the Act at this time. The district court answered that question affirmatively, relying on a long series of decisions of the D.C. Circuit.[10]

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[9] *See Bennett v. Spear*, — U.S. —, 117 S. Ct. 1154, 1161-62 (1997) (Endangered Species Act's citizen-suit provision removes any prudential barriers to standing); *Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (per curiam) (Federal Election Campaign Act's expedited review provision—which is substantially identical to that of the Line Item Veto Act—"provide[s] judicial review to the extent permitted by Art. III," easing standing inquiry); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (Civil Rights Act of 1968 provision authorizing any "person aggrieved" to sue grants standing "as broadly as is permitted by Article III of the Constitution") (citation omitted).

[10] *See, e.g., Michel v. Anderson*, 14 F.3d 623, 625-26 (D.C. Cir. 1994) (House Members have standing to challenge dilution of their votes caused by House Rule allowing territorial delegates to vote in the Committee of the Whole); *Barnes v. Kline*, 759 F.2d 21, 25-26 (D.C. Cir. 1984) (Members have standing to challenge presidential "pocket veto" as nullification of their votes), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996

(continued...)

The question of Member standing in this case is a narrow one. We suggest that there is no basis for constitutional concern where three circumstances are present, as they are here. First, the plaintiff Members are asserting a concrete, redressable injury to themselves: the Act changes the legal effect of votes they are sure to cast. Second, the Act itself authorizes Members to bring this case and asks this Court to decide it expeditiously, eliminating any concerns about uninvited intrusion on the political branches. Third, the question presented on the merits is one that the Court would answer at the behest of a non-Member plaintiff with standing (such as an individual or firm that could show it was denied a spending or tax benefit because of an unconstitutional item veto), which eliminates any concern about whether the question itself is suitable for judicial resolution. In these circumstances, there is a concrete case or controversy and no reason to fear that judicial resolution thereof would be inconsistent with the "properly limited role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

A. Appellees Have Article III Standing Because the Act Concretely Interferes With Their Constitutional Lawmaking Powers.

The district court held that appellees have shown the concrete, redressable injury in fact necessary for constitutional standing. The court recognized that Members, like any other plaintiffs, must show "(1) an injury personal to them, (2) that

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[10] (...continued)
(1979) (per curiam); *Kennedy v. Sampson*, 511 F.2d 430, 433-36 (D.C. Cir. 1974); *Synar v. United States*, 626 F. Supp. 1374, 1381-82 (D.D.C.) (three-judge court) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

has actually been inflicted by defendants or is certainly impending, and (3) that is redressable by judicial decree." J.S. at 10a (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)). The court ruled that appellees have sufficiently established that the Act (1) concretely and presently interferes with the Members' powers to negotiate and enact laws because it gives the President the power to unravel any legislative compromise, J.S. at 12a, and (2) changes the legal effect of votes that Members will certainly cast on appropriations bills in upcoming weeks, by transforming any vote for such a bill into a vote for a menu of options from which the President may make his own selections. J.S. at 11a.

Congress and the President certainly believed that individual Members had a concrete interest in the operation of the Act sufficient to confer standing. They are presumed to be aware of this Court's standing jurisprudence, *Bennett*, 117 S. Ct. at 1162, and their adoption of the judicial review provision reflects their judgment that Members had a sufficient interest in their Article I lawmaking powers that they could constitutionally be given the power to seek review. While this does not relieve the Court of its obligation to determine whether a constitutional case or controversy exists, the Court should give these judgments of the political branches due weight in its inquiry. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (recognizing that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries"); *id.* at 580 (Kennedy, J., concurring) (noting that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy," so long as it "relate[s] the injury to the class of persons entitled to bring suit").

And there is indeed a case or controversy. The appellee Members did not (as appellants suggest, J.S. at 18), assert

merely a generic interest "in the operation or outcome of the legislative process." They alleged specific injuries to themselves in the exercise of a power that is positively identified by Article I of the Constitution: the power to vote on the final passage of legislation. The Act (1) changes the legal effect of Members' votes on spending and tax bills and (2) unconstitutionally increases the President's power (and that of his legislative allies) to influence Member votes on all matters before Congress, interfering with Members' ability to reach legislative compromises.

Appellees' constitutional claim on the merits is that the Act deprives them of their right, as individual Members, to vote on every bill in the exact final form in which it becomes operative as law. That right is embodied in the Presentment Clause, Article I, Section 7, Clause 2, which requires that every bill, before it becomes a law, pass both the House and the Senate and be presented to the President, whose options are limited to signing or returning "it" (or taking no action, in which case "the Same" may become law without his signature). Prior to the effective date of the Act, when a Member voted for a bill, he knew that his vote could be counted only to pass that exact bill and no other: the bill could not subsequently be amended in either House of Congress, or by the President, without giving the Member another opportunity to vote on the amended bill.

The Act injures the appellee Members whenever they vote in favor of a bill containing vetoable items because it alters the meaning of their votes, depriving them of the assurance that only the exact bill on which they are voting may become law. Before the Act, when a Member voted for an appropriations bill containing items "A", "B", and "C", she knew that her vote could be counted only for a bill containing all three items and only those items; any variation would require another vote. Under the Act, the Member's same vote on the same

bill has a dramatically different effect: it becomes a vote to present the President with a menu of items that he may choose from without going back to Congress. When a Member votes for the "A-B-C bill" under the Act, she is now, automatically and unavoidably, voting to present the President with what he can item veto into the "A-B" bill, the "A-C" bill, the "B-only" bill, and every other combination that can be created out of "A", "B", and "C". *See* J.A. at 33-35 (Byrd Decl. ¶¶ 18-19). As the number of items in a bill grows, the number of possible combinations increases exponentially. (For example, a 30-item bill can be item-vetoed into over one billion combinations.) A Member who favors the "A-B-C" bill, but does not favor (or has not had the opportunity to consider) the "B-C" bill without "A", is out of luck: the Act has transformed her vote for the "A-B-C" bill into a vote for the "B-C" bill as well.

This alteration of the legal effect of a Member's vote is an injury in fact as described in this Court's cases. Votes on appropriations bills containing multiple items are "certainly impending" within the meaning of *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), since there is no doubt that the appellee Members will be called upon to vote on appropriations bills in the next several months. *See* J.A. at 32 (Byrd Decl. ¶ 6). The injury they will suffer when they vote is therefore plainly "imminent." *Defenders of Wildlife*, 504 U.S. at 564 n.2.

Equally clearly, the Member suffers a legally cognizable injury at the moment he votes on an appropriations bill that is subject to the Act, whether or not the President later vetoes any of its items. Options have value: a Member who is not permitted to vote "yea" or "nay" on a single bill in its exact final form, but is unconstitutionally forced to vote "yea" or "nay" on a menu of items from which the President may choose, is forced to surrender an important power at the moment of voting, and to transfer to the President a choice

that the Member is constitutionally entitled to exercise himself. Moreover, the Court has held repeatedly that a plaintiff who has a concrete stake in the outcome of a decisionmaking process has standing to challenge irregularities in that process, even if it is not certain that they will ultimately result in an injurious outcome. *See Bennett v. Spear*, — U.S. —, 117 S. Ct. 1154, 1164-65 (1997); *Defenders of Wildlife*, 504 U.S. at 573 n.7; *cf. Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (non-minority contractors had standing to challenge allegedly unconstitutional minority preference in government contracting process even though it is not certain they would have received contracts in absence of preference); *Buckley v. Valeo*, 424 U.S. 1, 11-12, 116-120 (1976) (per curiam) (candidates had standing to challenge unconstitutional composition of Federal Election Commission prior to its taking action adversely affecting them). A Member who, in voting "yea" on a bill, is unconstitutionally forced to give the President the option of vetoing an item without which the Member's vote would have been "nay" is suffering an injury well within the holdings of those cases, even if it is not then certain that the President will veto the item.[11]

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[11] Moreover, contrary to appellants' suggestion, J.S. at 14 n.6, this case is plainly ripe for adjudication. The provision for expedited review, 2 U.S.C. § 692(c), eliminates all prudential ripeness concerns. *See Buckley*, 424 U.S. at 117 (statutory expedited review provision shows that "Congress was . . . concerned with obtaining a final adjudication of as many issues as possible" and eliminates prudential concerns). Indeed, waiting for the President to veto a selected item will not further clarify the constitutional issues, *see Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985), but will leave not only the Act but the vetoed item and other provisions of the same statute under a constitutional cloud. The constitutional

(continued...)

This Court has recognized that individual legislators have a personal interest in their votes sufficient to give them standing to challenge actions that unconstitutionally negate those votes. In *Coleman v. Miller*, the Court held that members of a state legislature had standing to challenge a vote cast by the lieutenant governor (allegedly in violation of Article V of the U.S. Constitution) during the legislature's ratification of a federal constitutional amendment, because the lawmakers had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." 307 U.S. 433, 438 (1939).[12] The Court has since reaffirmed the validity of this holding.[13] Other courts have concurred. *See, e.g.*,

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[11] (...continued)
requirement of ripeness is satisfied because appellees' injuries are "certainly impending" and there is therefore a concrete present case or controversy. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 81 (1978).

[12] Although the legislator plaintiffs in *Coleman* brought suit in Kansas state court, this Court squarely decided that they had a sufficient interest to invoke the jurisdiction of a federal court: "had the questions [raised in the suit] been solely state questions, the [issue of standing] would have ended" with the Kansas Supreme Court's declaration that the plaintiffs had a sufficient interest to sue. But because the "questions raised in the instant case arose under the Federal Constitution," the Court independently reexamined the matter to satisfy itself that the plaintiffs had "an adequate interest to invoke our jurisdiction to review." 307 U.S. at 437-38. This Court's subsequent citations to *Coleman* confirm that the case has relevance to principles of Article III standing. *See, e.g., Buckley*, 424 U.S. at 12 n.10 (1976) (citing *Coleman* for proposition that "parties with sufficient concrete interests at stake have been held to have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights"); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (citing *Coleman* for proposition that individual voters have standing to challenge malapportionment of voting districts under 42 U.S.C. § 1983).

[13] *See* cases cited *supra* n. 12.

Michel v. Anderson, 14 F.3d 623, 625-26, 630 (D.C. Cir. 1994) (holding that House Members have standing to challenge committee votes given to District of Columbia and territorial delegates, and noting that Constitution specifically gives Members the right "to vote in the full House, and to be recorded"); *Barnes v. Kline*, 759 F.2d at 28 & n.15 (granting Members standing to challenge nullification of their votes by presidential pocket veto, citing *Coleman*); *Dyer v. Blair*, 390 F. Supp. 1291, 1297 n.12 (N.D. Ill. 1975) (three-judge court) (Stevens, J.) (citing *Coleman* for proposition that members of state legislature had standing to challenge state laws requiring a three-fifths majority to ratify amendments to U.S. Constitution).[14]

Coleman v. Miller makes it clear that Members have an *individual* interest in the integrity of their votes that gives them standing to challenge threatened dilutions. 307 U.S. at 438.[15] The vote is an individual right of the legislator, like his right to his seat in the legislature, *Bond v. Floyd*, 385 U.S. 116, 127 (1966), or his congressional salary, *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969), even when the dispute is between the House and one of its Members. Moreover, the injury that the individual appellees suffer as a

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[14] In *Coleman*, four Justices disagreed with the Court's ruling that plaintiffs had standing but, "[u]nder the compulsion of that ruling [on standing]," participated in the Court's determination of other issues in the case and concurred in the result. *Coleman*, 307 U.S. at 456-57 (Black, J., concurring).

[15] The Court's later reading of *Coleman* in *Baker v. Carr* confirms that the legislator's interest in his or her vote is a personal one. The individual voters in *Baker* were held to have standing to sue because they asserted "'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' *Coleman*, 307 U.S. at 438, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." 369 U.S. at 208 (additional citation and quotation marks omitted).

result of the Act's interference with their votes is no less particularized because all 535 Members of Congress would have standing to claim it. *See Defenders of Wildlife*, 504 U.S. at 572 (recognizing that "concrete injury" can be "suffered by many persons"); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen appellants' asserted injury.").

Appellee Members are affected by this change in the legal effect of their votes long before they begin voting. A Member engaged in the process of negotiating or drafting a spending or tax bill containing items he believes important must anticipate the President's unilateral power to revise the bill to eliminate those items, and tailor his strategy accordingly. Indeed, a Member now considering his vote on *any* matter in which the President has an interest (*e.g.*, other legislation, a treaty, or confirmation of a presidential appointment) must now weigh the President's power to veto an appropriation item or tax benefit of interest to that Member or his or her constituents. J.A. at 43-44, 58 (Levin Decl. ¶ 6A; Skaggs Decl. ¶ 3).

Moreover, the Act (quite deliberately) alters the process of formulating laws through legislative compromise. Prior to the Act, Members negotiating a compromise within the House or Senate on a spending or tax bill had assurance that the bill could take operative effect only in the form agreed to within that body, and that items successfully negotiated for would be preserved. Accordingly, a Member voting on final passage of a bill might accept provisions he disagreed with in order to secure passage of provisions he supported. *See* J.A. at 33-34, 43-45, 63 (Byrd Decl. ¶ 18; Levin Decl. ¶ 6; Waxman Decl. ¶ 7). But in giving the President power to upset legislative compromises by unilaterally striking items from legislation after its passage, the Act forces Members to deal with the

President in the item-by-item formulation of legislation, because he has the power to undo any compromise to which he has not agreed. *See* J.A. at 35-36, 39-40, 42-44, 58-59, 63 (Byrd Decl. ¶¶ 20-21; Hatfield Decl. ¶ 4; Levin Decl. ¶¶ 4, 6, 6A; Skaggs Decl. ¶¶ 3, 6; Waxman Decl. ¶ 7).

This disruption is a concrete, present effect of the Act, even though the item-veto power has not yet been exercised, as confirmed by the Act's proponents. *See supra* p. 7. The President's mere possession of the item-veto authority (which he has repeatedly said he would use[16]) gives him significant practical leverage over the lawmaking process.[17] As the Court has recognized, the creation of an impermissible veto authority over a decisionmaking body works a present injury because "[t]he threat of the veto hangs over the [decisionmaker] like the sword over Damocles, creating a 'here-and-now subservience' to" the officer or agency with the veto power. *Metropolitan Wash. Airports Auth. v. Citizens for the*

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[16] *See, e.g.*, 141 Cong. Rec. S8202-03 (daily ed. June 13, 1995) (containing letter from President to Speaker of the House; "Dear Mr. Speaker: I am writing to urge that Congress quickly complete work on line-item veto legislation so I can use it—this year—to curb wasteful tax and spending provisions."); Statement by the President Upon Signing S. 4 (Apr. 9, 1996). In a press conference following the district court's decision in this case, the White House confirmed that the President "fully intended to use" his item-veto power imminently. Press Release, 1997 WL 174185 at *1 (Apr. 11, 1997).

[17] The Framers recognized the sword-of-Damocles effect of the veto power. At the Constitutional Convention, James Wilson said that he "believed as others did that this [presidential veto] power would seldom be used. The Legislature would know that such a power existed, and would refrain from such laws, as it would be sure to defeat." 1 *The Records of the Federal Convention of 1787*, at 100 (Max Farrand ed. 1966) (hereinafter "Farrand"). Wilson also referred to the "silent operation" of the veto and its disciplining effect on the legislature. *Id.*

Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264-65 & n.13 (1991).

Appellants argued below and in their Jurisdictional Statement that appellees lack standing because they are asserting merely "'generalized grievance[s]' plainly insusceptible of judicial resolution," J.S. at 16 (quoting *United States v. Richardson*, 418 U.S. 166, 171 (1974)). But appellees are not "claiming only harm to [their] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large," *Defenders of Wildlife*, 504 U.S. at 573-74. Nor, more specifically, are they merely attempting to force executive compliance with legislation that they voted for (in which all citizens presumably have an interest). *Cf. Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975). The injury asserted here is an injury to appellees themselves, affecting them in the discharge of their occupational responsibilities. The D.C. Circuit has explained this distinction between a claimed injury "to [a] member['s] rights to participate and vote on legislation in a manner defined by the Constitution," which is a "specific injury" to him or her sufficient for standing, and a mere "generalized complaint that [the] legislator's effectiveness is diminished," which is not. *Moore v. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984).

B. Judicial Resolution of the Constitutional Question Presented Does Not Offend the Principle of Separation of Powers.

The appellee Members have alleged concrete present injuries, affecting them in the discharge of their legislative responsibilities, that would surely be sufficient to confer Article III standing on any individual whose occupation was

anything other than "Member of Congress." Nevertheless, appellants have implied that, even if there is redressable injury, and thus a case or controversy, the fact that appellees are Members of Congress, and the activity with which this case is concerned is the passage of legislation, makes the case less justiciable than a claim of injury to a member of another occupation in his conduct of some other activity. But even if the courts should decline to adjudicate some cases brought by Members with respect to the lawmaking process on separation of powers grounds, this is not such a case.

First, Congress and the President invited the district court and this Court to decide the constitutional issue presented, and while that invitation would not make up for the lack of a case or controversy, it largely resolves the objection to courts "setting [themselves] up as arbiters of . . . internal disputes" within the political branches. *Moore*, 733 F.2d at 958 (Scalia, J., concurring). The judicial review provision of the Act is a strong statement by the political branches that Members of Congress should have the right to challenge the Act's constitutionality and that it is appropriate and desirable for the courts to resolve the constitutional issue—indeed, to do so as expeditiously as possible. Such a statement should go far toward eliminating any concern about intrusion on the other branches. *See Flast v. Cohen*, 392 U.S. 83, 131-32 (1968) (Harlan, J., dissenting) ("Any hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President.").

Second, nothing about the question presented makes it inherently inappropriate for judicial resolution. There is no reason to doubt, and appellants concede, J.S. at 16, that if this case had been brought by a private plaintiff challenging the veto of an appropriation item in which he had a personal interest, the Court would proceed to decide the constitutional

issue, as it did in *INS v. Chadha*, 462 U.S. 919, 935-36 (1983) ("We must also reject the contention that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation of powers dispute with Congress, rather than simply Chadha's private interests."). In addition to the fact that Congress here invited the Court's resolution of this dispute, "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

II. THE TEXT AND STRUCTURE OF ARTICLE I FORBID CONGRESS TO GRANT THE PRESIDENT UNILATERAL POWER TO MAKE OR REPEAL A LAW, AS IT HAS DONE IN THE LINE ITEM VETO ACT.

The Constitution separates the power to make law from the power and duty to execute the law. Article I vests "[a]ll legislative Powers" in the Congress. U.S. Const. art. I, § 1. It gives the President only a qualified check on the law making process: the power to "return" (veto) a whole bill that has been presented to him, which is in turn subject to override by two-thirds of both Houses of Congress. *Id.* § 7, cl. 2. The President's constitutional role is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This separation of legislative and executive power is one of the foundations of our government, and this Court has taken important steps to preserve it. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Buckley v.*

Valeo, 424 U.S. 1, 129 (1976); *Chadha*, 462 U.S. 919; *Bowsher v. Synar*, 478 U.S. 714 (1986).

The Line Item Veto Act violates the constitutional plan. Its purpose and effect, clearly stated in its title and in its legislative history, are to give the President the power, in conjunction with signing a bill, to cause some of its provisions to be operative as law and others not, in violation of the long-established principle that, when a bill is presented to the President, he may only approve and sign or return it *in toto*. And the Act operates by giving to the President alone the power to repeal provisions of federal law, in violation of the bicameral passage and presentment requirements of Article I.

A. Article I Prescribes the Exclusive Means for Making Federal Law.

Article I sets forth a "single, finely wrought and exhaustively considered procedure" for the passage of legislation, in which the two core requirements are bicameral passage and presentment. *Chadha*, 462 U.S. at 951. Article I requires, first, that any bill making or changing federal statutory law must be passed by both Houses of Congress in exactly the same form. The Framers "provid[ed] that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses." *id.* at 948. They required bicameral passage quite deliberately, believing it would assure careful and prudent judgment in legislating. *See* The Federalist No. 22 (Hamilton), No. 51 (Madison); *Chadha*, 462 U.S. at 948-51 (*citing* 1 Farrand 254 (statement of James Wilson)).[18]

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[18] The requirement of bicameral passage was critical to the Great Compromise that enabled the Convention to agree on a Constitution. Giving the smaller states equal representation in the Senate and the

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Article I, Section 7, Clause 2 (the "Presentment Clause") then requires that every bill passed by both Houses shall be presented to the President, and it gives him exactly three choices: "[1] If he approve he shall sign it, but [2] if not he shall return it, with his Objections . . ." or [3] he may do nothing, in which case in ten days "the Same shall be a Law, in like Manner as if he had signed it, " unless the pocket veto clause applies. Unlike the House and Senate, each of which has the absolute power to block passage of a bill it disfavors, the President has only a qualified blocking power, because his veto may be overridden.[19]

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[18] (...continued)
larger states proportionate representation in the House of Representatives is a workable compromise only because both the Senate and the House must pass in the same form every bill that becomes law. *See* The Federalist Nos. 51, 62, 63 (Madison).

[19] The Constitution does not give the President any "legislative Powers" but only "a salutary check upon the legislative body," which begins after both Houses have passed a bill. The Federalist No. 73 (Hamilton). In the Pennsylvania Ratifying Convention, James Wilson denied that the Presentment Clause would give the President legislative power, stating that the language of the clause was precise: "'If he approve the bill, when it is sent, he shall sign it, but if not, he shall return it;' but no bill passes in consequence of having his assent: therefore, he possesses no legislative authority. [If the President vetoes a bill, but his veto is overridden] it becomes a law, not by his [authority], but by the authority of the two houses of the legislature." 2 *Debates* 473 (Jonathan Elliot ed. 1836).

The President's role in enacting legislation was a matter of considerable importance during the Convention. On June 4, 1787, the delegates discussed whether the President should be limited to a qualified rather than an absolute veto. 1 Farrand at 97-105. Alexander Hamilton and James Wilson proposed that the veto be absolute. Roger Sherman, however, was against "enabling any one man to stop the will of the whole." *Id.* at 99. After Benjamin Franklin explained that, with an absolute veto, "The Executive will be always increasing here, as

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The words of the Clause make it clear that the President may only approve and sign, or return, the whole bill exactly as it is presented to him. *See Field v. Clark*, 143 U.S. 649, 669-70 (1892) (There is "no authority . . . in the president to approve . . . as a legislative act, any bill not passed by congress."). This requirement has structural importance: it assures that each House of Congress has approved and passed, in exact final form, the whole of any bill that becomes law. The requirement also limits the President's power in the lawmaking process by denying him (just as the Constitution also denies the House and Senate) the power of unilateral revision of the work of the other participants. Indeed, it would be anomalous if the President, the only one of the three participants whose approval is *not* always required for a bill to become law, had the power to revise the work of the other two.

The requirement that the President sign, veto, or leave unsigned the bill as a complete whole has been clear since the beginning of the Republic: "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940). Eighteenth century explanations of the Presentment Clause are consistent with Washington's view. *See generally* 12 Op. Off. Legal Counsel 128 (1988). Later Presidents have understood that they could not approve or disapprove only parts of a bill.[20] From the time of the

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[19] (...continued)
elsewhere, till it ends in a monarchy," the state delegations voted unanimously against the absolute veto power. *Id.* at 103. The alternative of giving the President the power to suspend legislative acts temporarily was also unanimously defeated. *Id.* at 104. The qualified veto ultimately was approved, eight to two. *Id.*

[20] *See, e.g.*, 1995 Judiciary Comm. Hearings at 40 (statement of (continued...)

Framers there has been near unanimity that the President cannot sign some parts of a bill into law while rejecting other parts.[21]

B. The Line Item Veto Act Violates the Constitution's Requirements for Making, Amending, and Repealing Federal Law.

Appellants and the amici conceded below that Congress could not directly give the President the line item veto power. Def.'s Mem. Supp. Summ. J. at 13-14 (Feb. 26, 1997); Amici Mem. Supp. Constitutionality of Act at 29 (Mar. 18, 1997). They acknowledged that the Presentment Clause requires the President to act on the whole bill as presented to him. Nevertheless, the Act calls itself the "Line Item Veto Act," and its title precisely reflects its purpose: to give the President the unilateral power to determine, in conjunction with signing a bill into law, that some of its provisions will become part of the operative body of federal law while others will not. In effect, the Act does exactly the same thing as, and no more and no less than, a statute authorizing the President

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[20] (...continued)
Walter Dellinger, Assistant Attorney General); 12 Op. Off. Legal Counsel 128, 157-65 (1988) (describing the view of Presidents Washington, Grant, Hayes, Taft, Wilson, Ford and Reagan that they were required to sign or return multiple-item bills *in toto*, even though they approved some items and disapproved others); 9 Op. Off. Legal Counsel 28, 29 (1985); William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 11 (1916) ("[The President] has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it, and even his rejection of it is not final unless he can find one more than one-third of one of the houses to sustain him in his veto.").

[21] *See generally Line Item Veto: The President's Constitutional Authority, Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 103rd Cong. (1994).

to veto some items in any future appropriation, spending, or tax bill at the same time he signs the remainder.

The drafters of the Act attempted to circumvent the *in toto* requirement by a mechanism that is ~~too cl~~ever by half: under the Act, the President first signs a whole appropriation, spending, or tax bill and then "cancels" the items he does not like. But postponement of cancellation until after signing has no real-world consequence whatsoever. Under the Act, the President may sign a bill and then (since the bill becomes law in that instant) sign a cancellation message and immediately transmit it, without rising from his desk, without speaking to anyone, literally in the same breath.[22] The Court should see through this "indirect attempt to accomplish what the Constitution prohibits . . . accomplishing directly." *U.S. Term Limits Inc. v. Thornton*, 115 S. Ct. 1842, 1867 (1995) (striking down congressional term limits); *see also id.* at 1868 ("To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded.").

We show below that the Act's "sign and then cancel" mechanism violates the Article I requirements for the repeal of legislation. Preliminarily, however, we stress that the Act deliberately contravenes the spirit and purposes of the *in toto* requirement of the Presentment Clause. It gives the President a power of unilateral revision that the *in toto* requirement was

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[22] The Act gives the President up to five days to cancel items, but this allowance of a little additional time is of no practical or constitutional significance. The stated intention was that the President cancel "as soon as possible," H.R. Conf. Rep. No. 104-491, at 22 (1996), and the five days were allowed for administrative convenience, having been reduced from the twenty days in the House-passed bill. J.A. at 68 (L.S. at 2). The significant point is that the cancellation was expected to occur in conjunction with signing, and without any intervening event or change in circumstances.

designed to deny him. The Clause does not say merely, "he shall either sign it or return it." It says, "If he approves he shall sign it but if not he shall return it . . . ." The Constitution uses this language because it expects the President to make a judgment about whether he "approves" the bill Congress wrote or "not." He need not "like" everything in a bill, but his signature is supposed to reflect his bottom-line judgment that the bill that both Houses of Congress passed should, rather than should not, become law, and his commitment to the whole law as one he will faithfully execute. The Act relieves the President of having to make that bottom-line judgment. It says to him, "You can sign a bill without judging that the bill as a whole should become law, because you can immediately strike those parts, whether 5% or 95%, that you think should *not* be the law of the land."

This violation of the spirit in which the President is supposed to sign a bill does *not* invalidate his signature. To the contrary, we have always agreed with appellants that the whole appropriation, tax, or spending bill becomes law the instant the President signs it. That is why the Act's mechanism, as well as its purpose, is unconstitutional. Congress cannot constitutionally give the President the unilateral power to repeal provisions of a federal statute. Provisions can be repealed only by the constitutional process for making law: passage by both Houses of Congress and presentment to the President.

The text of the Act makes it clear that the President has been given the unilateral power to repeal provisions of federal law. The Act uses the word "cancel" rather than "repeal," but Section 691e(4) defines "cancel" to mean "to rescind" with respect to any item of discretionary budget authority, and "to prevent . . . from having legal force or effect" with respect to items of new direct spending or limited tax benefits. All

these words mean the same thing as "repeal."[23] The words also all produce the same result: provisions that have become law are removed from the body of operative federal statutes.[24] A cancellation "terminates" a provision permanently and irretrievably, as if it had never been enacted, or as if it had been repealed by an Act of Congress. If the President later changes his mind, or reaches a different judgment based on experience, or if circumstances change so as to make some canceled spending appear desirable, he cannot revive the canceled item but must seek passage of a new law through the full Article I process. Like any other repealed provision, a

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[23] As the district court pointed out, J.S. at 25a n. 13 (quoting Webster's Third New International Dictionary 1924 (Merriam 1981)), the dictionary definition of the verb "repeal" is "1: to rescind or revoke (as a sentence or law) from operation or effect."

[24] The Conference Report makes it clear that "cancellation" permanently alters the rights of individuals, states, government contractors, and others with interests in canceled items. H.R. Conf. Rep. No. 104-491, at 29 (1996) (in different contexts cancellation negates the government's "legal obligation to pay a benefit," "eliminat[es] the increase in food stamp obligations that otherwise would occur," and "foreclose[s] the ability of the Federal Government to enter into an agreement to pay the amount of money provided in the law").

As noted above, the House-passed version of the Act, H.R. 2, used the terms "veto" and "repeal," and the related committee report confirmed that repeal was intended: "Any provision of law, as set forth in the President's special message, shall be deemed *repealed* unless a rescission/receipts disapproval bill *restoring* that provision is enacted into law." *See* L.S. at 3 (emphasis added). The distinction between a temporary suspension (deferral) and a permanent repeal (rescission) was an essential element of the ICA as enacted in 1974. Although Congress changed the word to "cancel," it rejected the Administration's urgings to change the power given to the President to one of suspension only. *See* H.R. Conf. Rep. No. 104-491, at 20 (1996); pp. 6-7 *supra*.

canceled item can become law again only through the passage of a new statute.[25]

As noted above, under the Impoundment Control Act, the President (a) has statutory authorization to defer spending items for a limited period and (b) may recommend rescissions to Congress but may not rescind items unilaterally, because Congress recognized that repeals are legislative actions that only Congress may take. The Line Item Veto Act gives the President precisely the ability to change substantive law in permanent fashion that the ICA denied him. As the district court said, "The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent." J.S. at 21a-22a.[26]

In *Chadha*, the Court held that the power to make law can be exercised only in the manner the Constitution prescribes, including bicameral passage and presentment to the President.[27] *See also Metropolitan Wash. Airports Auth. v.*

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[25] The Act does provide for what are labeled "disapproval bills," but these are of no constitutional significance. A disapproval bill is a new statute that must go through the full constitutional process of enactment, including bicameral passage and presentment to the President. The Act provides merely that its consideration shall be expedited.

[26] The fact that a "cancellation" is a repeal is particularly clear in the case of limited tax benefits, which are statutory provisions affecting the tax liability of individuals and other taxpayers. A "cancellation" effectively removes such a provision permanently from the Internal Revenue Code, something that obviously could otherwise be accomplished only by a duly enacted law. The "limited tax benefit" provision is not severable from the Act because, as noted at p. 8, *supra*, the evidence is that Congress would not have passed the Act without it.

[27] 462 U.S. at 957. The legislative action at issue there was the effective repeal, through exercise of the one-House veto, of the statutory

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Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 n.19 (1991) ("when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I") (*quoting Bowsher*, 478 U.S. at 757-59 (opinion of Stevens, J.)). The *Chadha* principle applies no less to the repeal than to the enactment of federal law. *See* 462 U.S. at 954 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I."). The Act violates the *Chadha* principle by allowing the President alone to repeal parts of a statute without both Houses of Congress having first passed a repeal bill.

C. The Act Is an Abdication of the Power To Make Laws, Not a Delegation of Discretionary Spending Authority.

Appellants argued below and in their Jurisdictional Statement that the Act is merely a new form of delegating to the President the discretionary power to curb spending. One difficulty with this argument is that it neither explains nor saves the President's new powers to cancel entitlements and limited tax benefits. Moreover, this delegation argument cannot be limited to laws involving spending. As appellants were forced to concede at oral argument below, Transcript of Proceedings at 69-75 (Mar. 21, 1997), if Congress may give the President power to strike provisions of appropriation and direct spending statutes, there is no logical reason why he could not be given the unilateral power to make other changes in the operative body of federal law: *e.g.*, "The President may strike whatever provisions of civil rights law he considers

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[27] (...continued)
delegation of authority under which the Attorney General permitted Mr. Chadha to remain in the country.

unnecessary" or "The President may write a tax code in the public interest."

But there is a more fundamental difficulty. Appellants' argument ignores the basic constitutional distinction between the function of deciding what the law shall be and the function of carrying out Congress's instructions. *See Loving v. United States*, 116 S. Ct. 1737, 1744 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity."); *Field*, 143 U.S. at 692 ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."). Permanently striking one or more provisions of a federal law in conjunction with its enactment, because of a determination that a particular provision should not *be* law, is a congressional and not a presidential function.[28]

The Act is not concerned merely with levels of spending. It enables the President to select, from among all the federal

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[28] Our position is fully consistent with footnote 16 in *Chadha*, cited in the Government's Jurisdictional Statement, J.S. at 24-25. There are of course many actions that "may resemble 'lawmaking'" or are "quasi-legislative" that can nevertheless properly be delegated to the Executive "subject to check by the terms of the legislation that authorized [the actions]"; then, when the Executive does take such actions, it "does not exercise 'legislative' power" because it is acting within a proper delegation. 462 U.S. at 953 n.16. Properly delegable authority "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review," *id.*, but no such review of the President's cancellations under the Act would be possible. Moreover, there are powers that are so fundamentally legislative that they may be exercised only in accordance with Article I, and the powers to strike particular provisions of bills and statutes are in this category.

activities that Congress has provided for by statute, the activities in which the Federal Government will and will not engage. The power to cancel any amount of appropriation is the power to cancel the activities that appropriation pays for: all Veterans Administration hospitals, a controversial bomber that Congress has decided should be built, Amtrak, maintaining troops in Europe, farm subsidies, enforcement of the Endangered Species Act, and so forth. Under the Act, the President can cancel the current funding for, and thereby terminate, any program or activity of the Federal Government, large or small, that depends on one or more items of appropriation, unless the congressional proponents of that activity can muster the two-thirds vote needed to override the President's veto. And he can do so for any items separately stated in a bill or separately derivable from the legislative history. 2 U.S.C. § 691e(7)(A).

The Act does not make any cancellations mandatory, nor does it tell the President how much to cut, nor how to decide among possible cuts. Congress's only instruction to the President under the Act is "Cancel any or all appropriated amounts, for whatever federal programs or activities you think should be cut, from among those that we (Congress) have enacted." The President can eliminate the maintenance of the national parks, or school lunches, or the Coast Guard, and the Act tells him nothing about how to compare their relative importance. The Act thus gives the President fundamentally legislative authority, bounded only by his own view of which previously legislated programs should continue to exist.[29] The

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[29] As appellees argued below, if the Act were tested as a delegation statute, it would be "delegation running riot." *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring); *see Panama Refining Co. v. Ryan*, 293 U.S. 388, 414 (1935). The instruction, "Save as much or as little money as you think

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district court recognized this: "Never before has Congress attempted to give away the power to shape the content of a statute of the United States, as the Act purports to do. . . . The power to 'make' the laws of the nation is the exclusive, non-delegable power of Congress which the Line Item Veto purports to alienate in part for eight years." J.S. at 25a.

The reason for this abdication of legislative power is fully set forth in the legislative history. Congress decided that it was reluctant to do its basic job of determining which federal programs and activities should exist, and decided to cede that power to the President. The Conference Report is quite candid: "The purpose of the [Act] is to promote savings by placing the onus on Congress to overturn the President's cancellations of spending and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 16 (1996). Thus, under the Act, the President, not Congress, will decide which federal programs and activities are worth their cost and which are not, and if Congress disagrees with him, it will then have the "onus" of passing laws (if necessary over the President's veto) to overturn the President's policy decisions. Congress thus knew it was turning over to the President the very task of making law.

The fact that the Act is not a delegation of authority to execute the laws is further demonstrated by the requirement that the President must exercise the cancellation power, irrevocably, in conjunction with signing a statute. The usual purpose of spending discretion, where it is granted, is to give the President the ability to tailor spending to the needs of a program as revealed over time, or to circumstances as they change. The Act serves no such purpose, because its objective

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[29] (...continued)
desirable, by cutting any amounts, programs, or activities you think are not 'essential' and can be eliminated without 'harm[ing] the national interest,'" does not reflect any sort of intelligible principle.

was quite different: to give the President power to strike particular provisions from a law.

The Act differs fundamentally from the statutes in all of the delegation cases cited by appellants either to the district court or in the Jurisdictional Statement. Almost all delegation cases fall into two lines, which are the respective progeny of two early Nineteenth Century cases: *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), involving delegations to "fill up the gaps" in legislation, and *The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), involving express statutory direction, in the area of foreign relations, to change terms that have been set forth provisionally in the statute itself, on a finding of a specified change in conditions.

In *Wayman*, a case involving delegation to the judiciary, Chief Justice Marshall stated the general principle that still holds: "It will not be contended that Congress can delegate to the Courts . . . powers which are strictly and exclusively legislative." 23 U.S. at 42. "But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." *Id.* at 43. That is, not all of the powers actually exercised by Congress are "strictly and exclusively legislative" powers. Rather, Congress may assign to others the responsibility for making subordinate rules: "[A] general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Id.*[30]

Since that time, Congress has made many delegations to the President and to administrative agencies to "fill up the details" of general provisions of laws. Almost all of this

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[30] As then-Justice Rehnquist explained in 1980, what the delegation cases require "is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases." *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 675 (1980) (concurring opinion).

Court's delegation cases have involved such filling up of gaps.[31] When the details to be filled up in legislation are dependent on facts, it is particularly appropriate to call on the Executive, which can bring to bear both expertise and flexibility.[32]

Sometimes the gaps to be filled are particularly wide, as in the statute giving the FCC the power to grant radio licenses "if public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a); *see NBC v. United States*, 319 U.S. 190, 215-16 (1943). But even such delegations are constrained by the historical context and policies of the substantive statute, and do not permit the delegatee to overrule or to cancel what Congress has specifically prescribed. *See Mistretta v. United States*, 488 U.S. 361, 374-77 (1989) (describing "overarching constraints" on Sentencing Commission).

The other line of delegation cases, finding their origin in *The Brig Aurora*, involves the power to change terms that have been set forth in the statute itself, once a legislatively specified finding is made. "[I]nstead of directing another

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[31] *See, e.g., Loving v. United States*, 116 S. Ct. 1737 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *New York Central Secs. Corp. v. United States*, 287 U.S. 12 (1932).

[32] *See, e.g., Touby, supra* (Attorney General temporarily scheduled controlled substances on specified factual finding); *Lichter, supra* (in wartime, administrative officials renegotiated defense contracts on finding that profits were excessive); *Yakus, supra* (in wartime, Executive set price-ceilings after making a series of highly factual determinations); *Hope Natural Gas v. Federal Power Comm'n*, 196 F.2d 803 (4th Cir. 1952) (agency may set power rates after fact-finding).

department of government to apply a general statute to individual cases, or to supplement it by detailed regulation. Congress commands that a previously enacted statute be revived, suspended, or modified, or that a new rule be put into operation, upon the finding of certain facts by an executive or administrative officer." *The Constitution of the United States of America: Analysis and Interpretation*, Sen. Doc. No. 103-6, 76-77 (1996). Thus, in 1813, when Congress wished to impose restrictions on British shipping, but to make them contingent on certain changes in international commerce, it delegated to the President the power to determine when the restrictions would go into effect. This Court sustained that delegation: "[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct." *The Brig Aurora*, 11 U.S. at 388.

The Court's cases in this line involve matters of foreign relations, where the President's inherent powers come into play. As *United States v. Curtiss-Wright Corp.* made clear, "Congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs involved." 299 U.S. 304, 320 (1936). Similarly, *Field v. Clark*, 143 U.S. 649, (1892), and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), both upheld tariffs that could be suspended and reinstated, or raised and lowered, but not permanently changed, on the President's finding of certain facts involving commerce abroad. *Field v. Clark* specifically noted that "it is often desirable, if not essential . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." 143 U.S. at 691.

An arguable exception to the pattern described above is *Opp Cotton Mills v. Administrator of Wage and Hour Div.*, 312 U.S. 126 (1941), which has been described as "[t]he only case in which the power of an administrative official to modify a rule enacted by Congress relating to domestic affairs has been sustained." *The Constitution of the United States of America: Analysis and Interpretation*, Senate Doc. No. 99-16, 82 (1987). But *Opp Cotton Mills* is best understood as a "fill up the gaps" case. In the Fair Labor Standards Act, Congress established a general minimum wage but delegated to an agency the authority to increase the minimum in particular industries if it made specified findings after notice and comment proceedings. Congress thus merely authorized the agency to fill in the minimum wage amounts in accordance with specified instructions, while providing a general, interim baseline itself.

The remaining delegation case cited below by appellants is the three-judge court's decision in *Synar v. United States*, 626 F. Supp. 1374, 1382-1387 (D.D.C.), *aff'd on other grounds sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). That case involved the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (the Gramm-Rudman-Hollings Act). The three-judge court's opinion (this Court did not reach the issue) sustaining that act's delegation of power is instructive here. In Gramm-Rudman, Congress had made a policy choice to decrease the annual budget deficit in specified steps over a period of years and had created an automatic sequestration provision to make mandatory, across-the-board cuts in some programs, with a number of statutorily specified exceptions. The three-judge court ruled the delegation of power to sequester was constitutional because Congress had, itself, made the basic policy choices about which levels of predicted

federal spending should result in mandatory sequestration, and had spelled out the sequestration formula. The "only discretion conferred [was] in the ascertainment of facts and prediction of facts." *Synar*, 626 F. Supp. at 1389.

In contrast, the President's "cancellation" power under the Act is not the power to "fill up the details" of a legislative scheme, or to adapt a statutory program to circumstances. It is the final say in deciding whether to save money, how much to save, and which activities and programs should be terminated to do so. Instead of enabling the President to provide "assistance" to Congress without which it "cannot do its job," *Mistretta*, 488 U.S. at 372, the cancellation power enables the President to undo part of what Congress has just done. Instead of taking care that a law is faithfully executed, the President is deciding that a part of a law that he has just signed shall not be executed and shall not be law. As the district court said, "[t]he Line Item Veto Act, in contrast [to delegation cases], hands off to the President authority over fundamental legislative choices. Indeed, that is its reason for being. It spares Congress the burden of making those vexing choices of which programs to preserve and which to cut. Thus, by placing on itself the 'onus' of overriding the President's cancellations, *see* H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. at 16 (1996), Congress has turned the constitutional division of responsibilities for legislating on its head." J.S. at 27a-28a.

Finally, however broad the Congressional power to delegate to the Executive may be, it cannot possibly extend so far as to grant the line item veto authority that Article I of the Constitution, until properly amended, forbids the President to have.

CONCLUSION

This Court should affirm the decision of the district court.

Respectfully submitted,

CHARLES J. COOPER
MICHAEL A. CARVIN
DAVID THOMPSON
COOPER AND CARVIN
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8950

LLOYD N. CUTLER
Counsel of Record
LOUIS R. COHEN
JONATHAN J. FRANKEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

MICHAEL DAVIDSON
3753 McKinley Street, N.W.
Washington, D.C. 20015
(202) 362-4885

ALAN B. MORRISON
COLETTE G. MATZZIE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

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